

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

KERRY COX,

Plaintiff,

v.

THE HOME DEPOT U.S.A., INC., dba
HOME DEPOT NUMBER 4010, a
Delaware corporation licensed to
do business in the state of
Oregon, and JOHN DOE,

Defendants.

No. 3:13-cv-00587-HU

**FINDINGS AND
RECOMMENDATION**

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1 HUBEL, Magistrate Judge:

2 In this premises liability action, Plaintiff Kerry Cox
3 ("Plaintiff") moves, pursuant to Federal Rule of Civil Procedure
4 ("Rule") 15(a), for leave to amend his complaint in order to
5 substitute a named defendant for the Doe defendant and to remand
6 the case on the ground that the newly-named defendant would defeat
7 diversity jurisdiction. For the reasons that follow, Plaintiff's
8 motion (Docket No. 8) to remand this case Multnomah County Circuit
9 Court should be granted and Plaintiff's motion (Docket No. 10) to
10 substitute a named defendant for the Doe defendant should be
11 granted.

12 I. FACTS AND PROCEDURAL HISTORY

13 On May 14, 2011, Plaintiff went to purchase concrete blocks at
14 Defendant Home Depot, Inc.'s ("Home Depot") Hillsboro, Oregon
15 store. Since the concrete blocks were not located within arms
16 reach, Plaintiff requested assistance from Home Depot's employee,
17 John Doe. In an attempt to reach the blocks, John Doe stood on a
18 pile of lumber near the shelving, which ultimately spilled out from
19 underneath him. One of the pieces of lumber struck Plaintiff in
20 the lower leg and caused him to lose his balance and begin to fall.
21 At that point, "Plaintiff twisted and grabbed onto his cart in
22 order to prevent himself from falling to the ground." (Compl. ¶
23 5.) Plaintiff claims that "[t]he twisting motion caused [him]
24 significant and severe injury . . . and was due to the negligence
25 of Defendant John Doe," (Compl. ¶ 5), who was "acting within the
26 course and scope of his employment." (Compl. ¶ 2.)

27 On March 5, 2013, Plaintiff filed a negligence suit against
28 Home Depot and its unnamed employee in Multnomah County Circuit

1 Court. (Baker Decl. ¶ 1; Compl. at 4.) "Home Depot was [also]
 2 served on or about March 5, 2013." (Baker Decl. ¶ 3.) On April 5,
 3 2013, Home Depot removed the case to federal court on the basis of
 4 diversity of citizenship. According to the notice of removal, Home
 5 Depot is a corporation organized and existing under the laws of
 6 Delaware with its principal place of business in Georgia, the Doe
 7 defendant is "allegedly" a citizen of Oregon, and Plaintiff is a
 8 citizen of Oregon.¹ The notice of removal also states that the
 9 amount in controversy exceeds \$75,000. On June 28, 2013, Plaintiff
 10 filed the motion to remand and motion to substitute a named
 11 defendant for the Doe defendant, which are now before the Court.

12 **II. LEGAL STANDARD**

13 Under the federal removal statute, "[a]ny civil action may be
 14 removed to federal district court so long as original jurisdiction
 15 would lie in the court to which the case is removed." *Matheson v.*
 16 *Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003)
 17 (citing 28 U.S.C. § 1441(a)). District courts generally have
 18 original jurisdiction over all civil actions (1) "arising under the
 19 Constitution, laws, or treaties of the United States," 28 U.S.C. §
 20 1331, and (2) "where the matter in controversy exceeds the sum or
 21 value of \$75,000" and there is complete diversity of citizenship.
 22 28 U.S.C. § 1332(a). "A notice of removal must be filed within
 23 thirty days of receiving the initial pleading setting forth the

25
 26 ¹ "[B]ecause 'John Doe' is being sued under a fictitious name,
 27 his or her citizenship as it pertains to diversity is disregarded."
 28 *Barrus v. Recontrust Co., N.A.*, No. C11-618-RSM, 2011 WL 2360206,
 at *2 (W.D. Wash. June 9, 2011); see also 28 U.S.C. § 1441(a) ("For
 purposes of removal under this chapter, the citizenship of
 defendants sued under fictitious names shall be disregarded.")

claim for relief, and in a case based upon diversity jurisdiction, the notice of removal must be filed within thirty days from which it was ascertained the case was removable, but not more than one year after the commencement of the action." *Oliver v. McNeil-PPC, Inc.*, No. 1:12-cv-01865-AWI-SAB, 2013 WL 459630, at *2 (E.D. Cal. Feb. 4, 2013) (citing 28 U.S.C. § 1446(b)).

A district court may remand an action to state court for lack of subject matter jurisdiction or a defect in the removal procedure. See 28 U.S.C. § 1447(c). "A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a)." *Id.* "The burden of establishing federal jurisdiction is on the party seeking removal, and the removal statute is strictly construed against removal jurisdiction." *Prize Frize, Inc. v. Matrix (U.S.), Inc.*, 167 F.3d 1261, 1265 (9th Cir. 1999), *overruled on other grounds*, *Abrego v. The Dow Chem. Co.*, 443 F.3d 676 (9th Cir. 2006). The party seeking removal also has the burden of showing that it has complied with the procedural requirements for removal. *Schwartz v. FHP Int'l Corp.*, 947 F. Supp. 1354, 1360 (D. Ariz. 1996).

III. DISCUSSION

Before addressing the merits of Plaintiff's motions, the Court notes that "[u]ntimeliness of removal does not allow the court to sua sponte remand the action . . . because an untimely removal notice is a non-jurisdictional procedural defect that may be waived by a party failing to raise it." *McGuire v. California*, No. C-09-5918, 2011 WL 97736, at *1 (N.D. Cal. Jan. 12, 2011); *see also Kelton Arms Condominium Owners Ass'n, Inc. v. Homestead Ins. Co.*,

1 346 F.3d 1190, 1192 (9th Cir. 2003) (“[W]e hold that the district
2 court cannot remand sua sponte for defects in removal procedure.”)
3 Even if this issue had been raised by Plaintiff, however, the Court
4 would nonetheless conclude that the challenge was untimely. See 28
5 U.S.C. § 1447(c) (“A motion to remand the case on the basis of any
6 defect other than lack of subject matter jurisdiction must be made
7 within 30 days after the filing of the notice of removal under
8 section 1146(a).”); see also *Orange County Water Dist. v. Unocal*
9 *Corp.*, 584 F.3d 43, 49 n.11 (2d Cir. 2009) (“If the thirty-day
10 deadline under 28 U.S.C. § 1447(c) is applicable, then
11 [Plaintiff]’s remand motion was untimely because it was filed more
12 than thirty days after the notice of removal was filed in District
13 Court of the Central District of California.”)

14 Whether this case should be remanded for lack of subject
15 matter jurisdiction turns on whether Plaintiff is granted leave to
16 amend the complaint in order to substitute a named defendant for
17 the fictional Doe defendant. See *Lincoln Prop. Co. v. Roche*, 546
18 U.S. 81, 84 (2005) (“Defendants may remove an action on the basis
19 of diversity of citizenship if there is complete diversity between
20 all named plaintiffs and all named defendants, and no defendant is
21 a citizen of the forum State.”); see also *Loid v. Computer Scis.*
22 *Corp.*, No. CV-12-5144-EFS, 2013 WL 808696, at *6 (E.D. Wash. Mar.
23 5, 2013) (“Because the Jarrett Defendants, like Plaintiffs, are
24 residents of [the forum State], complete diversity of citizenship
25 is not present in this case, and the Court therefore lacks
26 subject-matter jurisdiction under 28 U.S.C. § 1332.”)

27 Home Depot contends that the Court should not grant
28 Plaintiff’s motion for leave to amend because it is futile. More

1 specifically, Home Depot argues that substituting the Doe defendant
2 would be futile because (1) two years have elapsed since May 14,
3 2011, the date Plaintiff was injured as a result of the Doe
4 defendant's alleged negligence, see OR. REV. STAT. § 12.110(1)
5 (negligence claims governed by two-year statute of limitations),
6 and (2) the Doe defendant would not qualify for relation-back under
7 Rule 15(c).

8 In his moving papers, Plaintiff seems to suggest that Home
9 Depot's counsel employed dilatory tactics during discovery to
10 prevent him from learning the Doe defendant's identity within the
11 statute of limitations period. As Plaintiff points out, in his
12 first request for production of documents, which was mailed to Home
13 Depot's counsel on April 23, 2013, Plaintiff sought "the identity
14 and address of Defendant John Doe, including but not limited to a
15 copy of Defendant John Does [sic] driver's license." (Mem. Supp.
16 Pl.'s Mot. Substitute at 2.) At some unspecified time after that,
17 Home Depot's counsel, one of whom apparently represents the Doe
18 defendant (i.e., Joshua Baker, who filed the notice of removal in
19 this proceeding and is listed as counsel of record for Home Depot
20 on the District of Oregon's electronic filing system), "objected to
21 production of the address of Defendant John Doe and to this date
22 has not provided any documents containing the address of Defendant
23 Doe." (Mem. Supp. Pl.'s Mot. Substitute at 2-3.)²

25
26 ² In late June 2013, after some back-and-forth between
27 opposing counsel, Home Depot stipulated that the Doe defendant "was
28 domiciled in the State of Oregon at the time of the alleged
incident." (Pl.'s Mot. Substitute at 2.) As discussed above,
however, Plaintiff was never provided with the information
necessary in order to effect service of process.

1 Under Oregon Revised Statute ("ORS") 12.150, a statute of
2 limitations is tolled "upon proof of absence or concealment." *Or.*
3 *Recovery, LLC v. Lake Forest Equities, Inc.*, 229 Or. App. 120, 125
4 (2009). ORS 12.150 provides:

5 If, when a cause of action accrues against any person,
6 the person is out of the state and service cannot be made
7 within the state or the person is concealed therein, such
8 action may be commenced within the applicable period of
9 limitation in this chapter after the return of the person
10 into the state, or after the termination of the
11 concealment of the person; and if, after a cause of
action has accrued against a person, the person shall
depart from and reside out of this state, or if the
person is concealed therein, the time of the absence or
concealment of the person shall not be deemed or taken as
any part of the time limited for the commencement of such
action.

12 OR. REV. STAT. § 12.150.

13 ORS 12.150 "applies only to Oregon residents and does not
14 apply to a foreign defendant." *Houston v. Sheration Centro*, Civ.
15 No. 05-3092-CL, 2007 WL 2492370, at *3 (D. Or. Aug. 24, 2007). "The
16 objective of the statute is not to assure that service can be
17 effected, but to assure that a plaintiff's ability to bring a
18 timely action is not defeated or frustrated by the inaccessibility
19 of the defendant." *Herzberg v. Moseley Aviation, Inc.*, 156 Or.
20 App. 1, 5 (1998). Indeed, as the Ninth Circuit explained in
21 *Bancorp Leasing & Financial Corp. v. Agusta Aviation Corp.*, 813
22 F.2d 272 (9th Cir. 1987): "This Oregon tolling statute is intended
23 to protect a plaintiff from the statute of limitations running on
24 his claim while he is unable to locate the defendant." *Id.* at 275.

25 Oregon case law concerning the application of ORS 12.150 is
26 quite sparse and research has not revealed a case addressing facts
27 similar to those alleged here. But courts outside this
28 jurisdiction have tolled statute of limitations when faced with

1 somewhat analogous predicaments. *Lafferty v. Alan Wexler Agency,*
 2 *Inc.*, 393 Pa. Super 400 (1990), is one example:

3 The question presented in this [premises liability] case
 4 is under what circumstances a plaintiff should be
 5 permitted to amend her complaint to substitute a new
 6 defendant for the defendant named in the original
 7 complaint, once the statute of limitations has run. We
 find that the statute of limitations is tolled where a
 defendant actively conceals the identity of the party
 against whom a plaintiff intends to bring a cause of
 action.

8 *Id.* at 401. *Sattler v. Bailey*, 184 W. Va. 212 (1990), is another:

9 The general statute of limitations . . . is tolled, with
 10 respect to an undiscovered wrongdoer, . . . when despite
 11 the due diligence of the injured person to discover the
 12 identity of all the wrongdoers, the identity of one or
 13 more of them is hidden by words or acts constituting
 14 affirmative concealment, that is, a 'cover-up.' Tolling
 of the statute of limitations with respect to an
 undiscovered wrongdoer is especially appropriate in a
 case in which, as part of the cover-up, the injured
 person is impeded in discovering the identity of the
 wrongdoer in question

15 *Id.* at 229 (internal citations omitted).

16 The California Supreme Court's decision in *Bernson v.*
 17 *Browning-Ferris Industries*, 7 Cal. 4th 926 (1994), is also
 18 instructive for the purposes of the present case. That decision
 19 speaks for itself and merits quoting at length:

20 [T]he equitable principle that a defendant who
 21 intentionally conceals his or her identity may be
 22 equitably estopped from asserting the statute of
 limitations to defeat an untimely claim, has been widely
 embraced. . . .

23

24 . . . [W]here the bar becomes a sword rather than a
 25 shield, wielded by a party that has intentionally cloaked
 26 its identity, factors of fairness and unjust enrichment
 27 come into play, which courts are bound to consider in
 28 equity and good conscience. As we long ago observed,
 [t]he statute of limitations was intended as a shield for
 defendant's protection against stale claims, but he may
 not use it to perpetrate a fraud upon otherwise diligent
 suitors.

1 . . . One should not profit from one's own
2 wrongdoing. Accordingly, we hold that a defendant may be
3 equitably estopped from asserting the statute of
4 limitations when, as the result of intentional
5 concealment, the plaintiff is unable to discover the
6 defendant's actual identity. . . . [U]nder the
7 circumstances described, the statute may be equitably
8 tolled.

9 The rule of equitable estoppel includes, of course,
10 the requirement that the plaintiff exercise reasonable
11 diligence. Thus, under our holding the statute will toll
12 only until such time that the plaintiff knows, or through
13 the exercise of reasonable diligence should have
14 discovered, the defendant's identity. . . .

15 One factor which must be considered pertinent to the
16 diligence inquiry is whether the filing of a timely Doe
17 complaint would, as a practical matter, have facilitated
18 the discovery of the defendant's identity Where
19 the identity of at least one defendant is known, for
20 example, the plaintiff must avail himself of the
21 opportunity to file a timely complaint naming Doe
22 defendants and take discovery. However, where the facts
23 are such that even discovery cannot pierce a defendant's
24 intentional efforts to conceal his identity, the
25 plaintiff should not be penalized.

26 *Id.* at 934-38 (citation and internal quotation marks omitted;
27 brackets deleted).

28 The objective and intent of ORS 12.150, and the reasoning
underlying the aforementioned decisions, convinces the Court that
the statute of limitations on Plaintiff's negligence claim was
tolled. Although Plaintiff did not mail his first request for
production of documents until April 23, 2013 (arguably, three weeks
before the running of the statute of limitations), the Doe
defendant's participation in this litigation should not turn on the
fact that Home Depot's counsel never provided Plaintiff with
identifying information. To rule otherwise here would incentivize
gamesmanship, not promote decisions on the merits. Indeed, the Doe
defendant is represented by Home Depot's counsel, who could have

1 easily provided the identifying information prior to the alleged
2 expiration of the statute of limitations.

3 In summary, Plaintiff's motion to substitute a named defendant
4 for a Doe defendant should be granted because this action is not
5 time-barred, which in turn means there is no need for relation
6 back. *Cf. Korbe v. Hilton Hotels Corp.*, Civ. No. 08-1309-PK, 2009
7 WL 723348, at *5 (D. Or. Mar. 13, 2009) ("If an action is not
8 time-barred under the state statute of limitations scheme, there is
9 no need for relation back and Rule 15(c) simply does not come into
10 play.") Since diversity jurisdiction is no longer present, this
11 case should be remanded to Multnomah County Circuit Court. The
12 Court should deny Plaintiff's request for attorney's fees under 28
13 U.S.C. § 1447(c) because of the dearth of authority in Oregon on
14 these issues, and because Home Depot had an objectively reasonable
15 basis for removal. *See Martin v. Franklin Capital Corp.*, 546 U.S.
16 132, 136 (2005) ("[A]bsent unusual circumstances, attorney's fees
17 should not be awarded when the removing party has an objectively
18 reasonable basis for removal.")

19 IV. CONCLUSION

20 For the reasons stated, Plaintiff's motion (Docket No. 8) to
21 remand this case Multnomah County Circuit Court should be granted
22 and Plaintiff's motion (Docket No. 10) to substitute a named
23 defendant for a Doe defendant should be granted.

24 V. SCHEDULING ORDER

25 The Findings and Recommendation will be referred to a district
26 judge. Objections, if any, are due **November 12, 2013**. If no
27 objections are filed, then the Findings and Recommendation will go
28 under advisement on that date. If objections are filed, then a

1 response is due **November 29, 2013**. When the response is due or
2 filed, whichever date is earlier, the Findings and Recommendation
3 will go under advisement.

4 Dated this 23rd day of October, 2013.

5 /s/ Dennis J. Hubel

6 -----
DENNIS J. HUBEL

United States Magistrate Judge